In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-143

ROY SPLAWN, *Petitioner*

VS.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California,
First Appellate District, Division Three

ARTHUR WELLS, JR.,
WELLS & CHESNEY, INC.,
125 Twelfth Street, Suite 157,
Oakland, California 94607,
Attorneys for Petitioner.

RICHARD L. CHESNEY,
Of Counsel.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

Table of Authorities Cited

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Petitioner Roy Splawn prays that a Writ of Certiorari issue to review the judgment and order of the Court of Appeal of the State of California, First Appellate District, Division Three, filed in the above-entitled case on March 29, 1976.

OPINION BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Three, affirming the judgment of the trial court was filed on March 29, 1976, but has not been and will not be officially

reported and published. See *California Rules of Court,* Rule 976. The opinion is set out in full as Appendix A of this Petition.

JURISDICTION

On June 22, 1971, Petitioner was convicted in the Superior Court of the State of California for the County of San Mateo of a violation of California Penal Code Section 311.2, the obscenity statute. On July 26, 1971, judgment was entered upon the conviction and an appeal was timely perfected in the California Court of Appeal, which affirmed the judgment in an opinion filed on January 11, 1973. A Petition for Hearing in the California Supreme Court was timely filed on February 16, 1973, and was denied without opinion on March 8, 1973.

A Petition for Certiorari was then filed with this Court. Certiorari was granted, the judgment of the Court of Appeal was vacated and the case was remanded for reconsideration in light of *Miller v. California,* 413 U.S. 15, and its siblings. *Splawn v. California,* 414 U.S. 1120.

Thereafter, the California Court of Appeal once again affirmed the conviction. A Petition for Hearing before the California Supreme Court was denied on May 26, 1976, by an order, a copy of which is set out herein as Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Was Petitioner subjected to an *ex post facto* application of California obscenity law where he was convicted by the use at trial of a "pandering" law which was not in force at the time of the offense and with which he was not charged in the Information?

2. In an obscenity prosecution of a retail bookstore owner not shown to have any connection with the creator or publisher of the matter in question, is it constitutional to instruct the jury that the financial motives of the creator of the material could be considered evidence that the material was "obscene"?

3. Is a retail bookstore owner denied due process when his conviction of an obscenity violation is based on the motives and behavior of persons with whom he has no connection and over whom he has no control?

4. Is an obscenity conviction premised upon "pandering" constitutionally permissible where there is no evidence of commercially exploitative behavior by the defendant?

5. Does a state invidiously discriminate against retail bookstore personnel when it legislates an obscenity law which excludes from liability motion picture operators and projectionists, but no others?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment I, provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; of abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. United States Constitution, Amendment XIV, provides, in material part, that:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. California Penal Code Section 311.2 provided, at the time of this case, that:

> (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.
>
> (b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who

> is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place where he is so employed.

4. California Penal Code Section 311 provided, at the time of the offense, Stats. 1961 ch. 2147, that:

> (a) "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, take as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters, and is matter which is utterly without redeeming social importance.
>
> (b) "Matter" means any books, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction, or any other articles, equipment, machines or materials.
>
> (c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.
>
> (d) "Distribute" means to transfer possession of, whether with or without consideration.
>
> (e) "Knowingly" means having knowledge that the matter is obscene.

STATEMENT OF THE CASE

Petitioner, Roy Splawn, his brother Don and one other person, Robert Esselstein, were charged, on November 19, 1969, with one count of felony conspiracy. The Complaint, and subsequently the Information, each charged a conspiracy to commit a misdemeanor violation of California Penal Code §311.2, the California obscenity statute. The conspiracy was charged to have commenced on August 1, 1969, and to have terminated on November 7, 1969. Each defendant was also charged with a misdemeanor Penal Code §311.2 obscenity violation. After pleas of not guilty, and appropriate motions, which were denied, jury trial started on June 7, 1970. On June 18, the People moved to dismiss the charges against the defendant Esselstein, which motion was granted. On June 22, the jury returned verdicts of Not Guilty as to all counts against Donald Splawn, a verdict of Not Guilty as to the Felony Conspiracy count against petitioner Roy Splawn, and a verdict of Guilty against petitioner Roy Splawn on the misdemeanor count of violation of California Penal Code Section 311.2—the obscenity statute.

On July 26, petitioner's motion for probation was denied and he was sentenced to ninety-one (91) days in the County Jail, one (1) day suspended, and ordered to pay a fine of one thousand dollars ($1,000.00) plus state assessment. Bond on Appeal of twelve hundred fifty dollars ($1,250.00) was posted and the execution of the sentence stayed pending appellate review.

The appellate history of this case has been set forth in the Jurisdictional Statement.

EVIDENCE AND INSTRUCTIONS

I

On July 31, 1969, a Redwood City, California, reserve police officer, who was a carpetlayer by trade, went, in an "undercover" capacity, to a bookstore owned by petitioner. (R.T. 27-8)[1] There he found petitioner's brother, Don, working behind the sales counter. The policeman asked to see petitioner Roy Splawn about purchasing some "hard-core" "under-the-counter" films. (R.T. 28). Although the store sold materials with sexual content, no such films were carried in the store. (R.T. 28-29). The officer was told to return the next day. (R.T. 29). When he so returned, neither petitioner Roy Splawn nor the requested films were present. (R.T. 30).

The officer left and the matter was apparently dropped until November 4, 1969. On November 4 and 5, the officer made repeated contacts with Don Splawn in an attempt to buy films, which were still not for sale in the store. (R.T. 32). Finally, in the evening of November 5, the officer found petitioner Roy Splawn in the store and told him he wanted "hard-core" movies. (R.T. 46-47).

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[1] "R.T." refers to the Reporter's Transcript. "C.T." refers to the Clerk's Transcript.

Petitioner told the officer that he did not have any such films but that he could get them from San Francisco. (R.T. 47).

On November 7, 1969, the officer came to petitioner's store, where he obtained from Robert Esselstein, a clerk, a package containing two reels of film which graphically displayed sexual behavior, for which he paid seventy dollars. (R.T. 5, 96).

Roy Splawn was convicted for distributing those two reels of film.

II

The offense of which Petitioner was convicted was not charged by the prosecution in the context of the circumstances of production, distribution or publicity of the films in question. No reference to any pandering activity is found in the information. (C.T. 7).

Three days *after* the date of Petitioner's offense, an amendment to California's obscenity law became effective, which provided that:[2]

> In prosecutions under this chapter where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.
>
> P.C. 311(a)(2), effective November 10, 1969.

[2]Without this amendment, the California Supreme Court had held that the prosecution could not go to the jury on a "pandering" theory, at least where "pandering" was not charged in the indictment or information. *People v. Noroff*, 67 C.2d 791 (1967).

Nevertheless, the trial court instructed the jury on the issue of "pandering", as follows:

> (1) [i]n determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, such evidence is entitled is a matter for you, the Jury, to determine. (R.T. 882).
>
> (2) Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter [is] utterly without redeeming social importance. *(Id.)*
>
> (3) If the object of work is material gain for the creator through an appeal to the sexual curiosity and appetite by animating sensual detail to give the publication a salacious case, this may be considered as evidence that the work is obscene. (R.T. 883).

HOW THE FEDERAL QUESTIONS ARE PRESENTED

1. Petitioner objected to the trial court's instructions on pandering (R.T. 755-758) and both on appeal and in his Petition for Hearing in the California Supreme Court urged

(a) that the giving of any "pandering" instructions constituted an *ex post facto* application of the law and

(b) that the instructions given on "pandering" denied him both his due process and free speech rights under the federal constitution. These contentions were rejected by the trial court, the Court of Appeal (Appendix A, pp. viii-ix, *infra*) and inferentially, by the California Supreme Court (Appendix B, *infra*).

2. Petitioner moved the trial court to dismiss the information on the ground that the California obscenity statute denied petitioner equal protection of the law under the Fourteenth Amendment. (C.T. 31-34). The motion was denied. The question was again raised on appeal and by Petition for Hearing and Petitioner's position was again rejected (Appendix A, pp. iii-iv, *infra*; Appendix B).

REASONS FOR GRANTING THE WRIT

I

REVIEW MUST BE GRANTED TO CORRECT THE SERIOUS UNCONSTITUTIONAL MISAPPLICATION OF THIS COURT'S "PANDERING" DOCTRINE TO PETITIONER AND TO SET FORTH THE MANNER IN WHICH THIS DOCTRINE IS TO BE APPLIED TO RETAIL SALES

A

This Court's "Pandering" Doctrine Is Limited To Evidence Of Exploitative Behavior By Those On Trial In Close Cases.

In 1966, this Court enunciated a rule of evidence, applicable to obscenity cases, known as the "pandering" doctrine. This doctrine permits the fact finder, in close cases, to consider evidence of the way in which a defendant treated material in the marketplace to help it evaluate his claim at trial that the material has "social value". The doctrine is a limited one, as a brief review of the facts of *Ginzburg v. United States,* 383 U.S. 463, the seminal case of this Court dealing directly with the matter, plainly shows.

In *Ginzburg,* evidence at trial established that the defendant had engaged in a widespread advertising campaign in which he stressed the sexual candor of his material and boasted that full advantage was being taken of "an unrestricted license allowed by law in the expression of sex and sexual matter". 383 U.S. at 468. Ginzburg commenced his advertising from towns whose names had sexual implications, represented his publications as erotically arousing, and, as to at least one book, proclaimed its obscenity, 383

U.S. at 470, 472. At trial, Ginzburg introduced evidence of the "social value" of his material. The trier of fact was permitted to consider evidence of Ginsburg's advertising campaign to help it determine if Ginzburg's claim of social value was sham. This Court, after considering the propriety of such evidence, concluded that

> [w]e perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test. 383 U.S. at 474.

This short review of the factual setting which gave birth to the "pandering" doctrine clearly shows its limitations:

1. The doctrine is permitted only as a means of controlling commercial *exploitation* of potential unhealthy (i.e., prurient) aspects of sexual material. The doctrine has no application to commercial activity which is not exploitative.
2. The doctrine is limited to evidence of a *defendant's* behavior.
3. The doctrine affects only the issue of the existence of social value, or its present doctrinal equivalent.
4. The doctrine is limited to "close" cases.

The result of the application of the pandering doctrine is to permit some material which on its face is not obscene, because it appears to have social value or to be serious, to be treated as though it did not;

it permits material entitled to constitutional protection in a neutral environment to be stigmatized as obscene because of the manner in which it has been treated by those on trial.

It is obvious that the only justifications for the application of a doctrine which undercuts the strict criteria otherwise necessary for a finding of obscenity are to permit focus upon the behavior of those on trial, and to control improper, exploitative behavior with respect to sexual materials. Thus, if the pandering doctrine is enlarged to include consideration of the behavior of those who are not on trial, or if it is applied to neutral sales activity which contains no elements of exploitation, it loses its constitutional justification and denies defendants their constitutional rights to disseminate material with sexual content and their due process rights to be tried on the basis of their behavior rather than that of someone else with whom they have no connection.

As this case shows, see *infra,* the pandering doctrine is presently subject to misinterpretation and abuse because there has been no appropriate analysis by this Court limiting the pandering doctrine to its proper use. This Court should therefore enunciate the principles which will permit the doctrine to fulfill its intended function but no others.

B

This Case Furnishes An Appropriate Vehicle For Resolving Important Issues Regarding This Court's Pandering Doctrine.

This case squarely presents three fundamental issues concerning the applicability of the pandering doctrine to retail sellers:

(1) Whether pandering instructions are proper in all obscenity cases regardless of a defendant's behavior;

(2) Whether instructions which focus on the motive of the creator or producer of the material in question are constitutionally proper in the trial of a retail seller having no connection with the creator or seller; and

(3) Whether instructions which permit evidence of pandering to be considered on the issues of prurient appeal and patent offensiveness are constitutional.

1.

The opinion of the Court of Appeals, Appendix "A", is devoid of facts indicating exploitative behavior by Petitioner. The opinion merely recites that a sale of films for $70.00 was made (page 4). The record shows that the buyer, an undercover agent, made over six attempts to obtain films before he was successful (Reporter's transcript, pp. 28, 30-37, 45-47, 326-9).[3]

[3]While this is not reflected in the opinion, it was brought to the attention of the Court of Appeals both in Appellant's Opening Brief, pp. 4-5, and Appellant's Petition for Rehearing, p. 3.

Thus it is evident that we have here a typical sale without advertising or puffing by the seller. Is such a sales transaction pandering? Are pandering instructions constitutionally proper on such evidence under the United States Constitution?

While it is now clear that commercial *activity* involving sexual material will continue to be subject to governmental regulation, *Miller v. California,* 413 U.S. 15, *supra,* this does not mean that all commercial activity involving sexual material amounts to commercial *exploitation* of that class of material. Although the California Court of Appeals did not, this Court must clearly draw the distinction between commercial *activity* and commercial *exploitation.* If it fails to do so, retail sellers, both owners and their employees, will be afraid and unable to engage in simple sales transactions for fear that their conduct will be labeled as pandering. And if juries are told that they may dispense with some of the prerequisite criteria for a finding of obscenity because of normal sales activity, then much material of value will be wrongfully tainted as obscene.

Before a jury, by being instructed on pandering, is invited to dispense with or relax some of the necessary elements of obscenity, there must be evidence which shows behavior beyond normal sales activity. Where no exploitative behavior is present, it is error to apply the doctrine of pandering. Cf. *Thompson v. Louisville,* 362 U.S. 199; *Garner v. Louisiana,* 368 U.S. 157; *Barr v. Columbia,* 378 U.S. 146.

This Court should so hold.

2.

In this case, the jury was instructed that

(a) they could consider circumstances of production, among other things, to determine if the material in question was being exploited by petitioner;

(b) if the "purveyor's" sole emphasis was upon the sexually *provocative* aspects of the material, that "fact" *alone* could justify the conclusion that the material was utterly without redeeming social importance;

(c) if the object of the material was financial gain for the *creator,* such a fact could be considered evidence that the material was *"obscene"*.

No instruction limited the above considerations to the situation in which the case was a close one.

These instructions demonstrate substantial constitutional error.

1. In the first place, they destroy the requirement that material must meet California's three part test[4] before it can be found to be obscene. Thus, "provocativeness" rather than prurience becomes the test for obscenity under the instructions. Further, under the instructions provocativeness may negate social value, no matter how valuable the material is. And, most seriously, the instructions dictate the applica-

[4]This case was tried pursuant to California Penal Code 311(a), which substantially tracks the test set forth in *Memoirs v. Massachusetts,* 383 U.S. 413. However, the analysis applies equally to the new *Miller* criteria.

tion of a test which makes "financial gain for the creator" evidence of "obscenity" in general. In other words, under the instructions, evidence that the *creator* was financially motivated is evidence that the material is prurient, is patently offensive, and utterly lacks social value. Thus, the test set forth in the instructions totally undercuts the basic First Amendment rationale requiring a strict standard for suppression of material because of its *content.*

2. If "provocativeness" and the financial motives of the creator are to be tests for *obscenity,* there will be no way in which dealers can receive fair notice of what is prohibited.

3. The instructions permitted findings upon the three issues related to the obscenity of the material to be based upon the motive and behavior of persons who were not on trial, and with whom defendant had no connection. In this trial of a retail seller, the jury was told that the motives and behavior of the creator of the material could be considered evidence that the material was *obscene.* These "pandering" instructions placed responsibility upon defendant for the behavior of others not connected with him.

Even if there were no First Amendment issues present in this case, this would be serious error, for it is axiomatic that one cannot be held criminally responsible for the behavior and motives of others absent some clear connection between them. In the First Amendment context, it is obvious that the pandering doctrine was misapplied, for the instructions permitted focus upon the treatment of the material

by others, not defendant, and *the behavior of others was thus permitted to determine the character of the material in the hands of defendant.*

In a nutshell, pandering law was misapplied because under the instructions "the conduct of the defendant" was not the "central issue" of his trial, cf. *Roth v. U.S.*, 354 U.S. 476 (Warren, C.J., concurring)

The Court should hear this case to correct these and future similar obvious abuses of the pandering doctrine, which otherwise inhibit First Amendment activity and deny due process to retail sellers.

II

THE PETITION SHOULD BE GRANTED TO DECLARE THAT CALIFORNIA OBSCENITY LAW IS UNCONSTITUTIONAL BECAUSE IT INVIDIOUSLY DISCRIMINATES AGAINST RETAIL SELLERS OF BOOKS, MAGAZINES AND FILMS.

A.

At the time of the trial herein, California Penal Code Section 311.2 excluded from criminal liability a motion picture operator or a projectionist of a film when he had no financial interest in his place of employment. Penal Code Section 311.2(b).

It left necessary employees of theaters free from potential penalty but allowed the prosecution of anyone who sold a book, magazine or film, rather than showed a film.

Such a classification appears to be without justification. In any event, such a classification clearly burdens those who would deal in books and magazines, or sell rather than project films.

When a classification is challenged as affecting the exercise of fundamental First Amendment freedoms, it must be shown by the State to be necessary to promote a compelling state interest and to be drawn so as to achieve its object without unnecessarily burdening or restricting constitutionally protected activity. See, e.g., *Sherbert v. Verner,* 374 U.S. 398, 406; *Shelton v. Tucker,* 364 U.S. 479, 488; cf. *Dunn v. Blumstein,* 405 U.S. 330.

If California's purpose was to protect "innocent" employee operators or projectionists it had no constitutionally permissible basis for refusing that same protection to employee retail clerks who would, by hypothesis, have even less knowledge of the content of the goods they handled than a projectionist and certainly would have less knowledge and control than a motion picture operator. Indeed, it is difficult to imagine a *compelling* state interest promoted by California's discriminatory statute.

Defendant Splawn did no more than sell two films. Yet, his behavior, under the statute, makes him subject to conviction when those with similar functions (relative to the business of showing films) are immune. This discrimination, lacking a compelling justification, deprived Splawn of equal protection of the law.

Projectionists can exhibit regardless of their degree of control over the exhibition. As "exhibition"

presumably covers all their necessary job functions, they are free from all prosecution.

Operators can exhibit regardless of their degree of control. Thus, operators are free to manage or otherwise run theaters any way they please. They can advertise and they can pander, and still not be subject to prosecution.

Booksellers and film dealers on the other hand, cannot exhibit, or distribute, which means that they are liable for prosecution for doing the obvious fundamental acts for which they are either hired or in business. As many persons employed by bookstores have duties related to putting books on the shelves for sale, they in the normal course of their duties are involved in the exhibition of the material and are therefore subject to prosecution. Lastly, a clerk, with specified duties over which he has no control, cannot stand mute and take money for a book or magazine, while a movie operator is free to do as he pleases.

This scheme appears to make no sense. In any event, it invidiously discriminates against bookstore and film store personnel without a compelling state interest and is therefore unconstitutional.

Further, petitioner Splawn, the operator of the retail store, was convicted under a statute which classifies those who can be subject to criminal liability by their status as one with a "financial interest" in their place of employment. This statutory scheme is discriminatory; it operates to place burdens upon the book, magazine and film retail sales trade which can-

not be justified simply because of its commercial character and the possible financial interests of a potential defendant. See *Ginzburg, supra,* at 474; *New York Times v. Sullivan,* 376 U.S. 254; *Smith v. California,* 361 U.S. 147, 150.

Thus, while defendant Splawn's conduct might be regulated in this field under a more precisely drawn scheme, the statute itself is void on its face. See e.g., *Thornhill v. Alabama,* 310 U.S. 88; *N.A.A.C.P. v. Button,* 371 U.S. 415, 432-33; *Baggett v. Bullitt,* 377 U.S. 360, 366.

This Court should not condone the continuing vitality of a statute which grossly discriminates against classes of persons exercising their First Amendment rights and should therefore grant a hearing in this case to strike down Cal. P.C. 311.2.

III.

SERIOUS CONSTITUTIONAL ERROR WAS COMMITTED BY THE RETROACTIVE APPLICATION OF PENAL CODE SECTION 311(a)(2) TO THE FACTS OF THIS CASE.

The events which gave rise to Petitioner's prosecution occurred between July 31 and November 7, 1969. During that time there was no California Penal Code Section 311(a)(2); no California statute or case defined "pandering" for purposes of state law or made "pandering" a crime or evidence of a criminal violation.

Moreover, the California Supreme Court had recently rejected a prosecution claim that it should have been permitted to go to the jury on a "pandering" theory to try to obtain a conviction involving a magazine not obscene on its face. *People v. Noroff,* 67 C.2d 791, *supra.* In *Noroff,* the California Supreme Court rejected a claim that "pandering" evidence could be used to obtain an obscenity conviction, absent an enabling statute or a specific charge of pandering by the prosecution.

Thus, whatever behavior petitioner engaged in relative to the sale of the films in question could not, under *Noroff,* have had a bearing on whether the films were found obscene.

Even though California Penal Code Section 311 (a)(2) became law after the facts of this case happened, the trial court applied the terms of the section to petitioner's behavior. This denied petitioner due process and subjected him to an *ex post facto* application of the law.

Before the passage of P.C. 311(a)(2) dealers in sexual material could rely solely on the content of the material in evaluating whether to deal in it. Dealers had a vested defense: they could require the state to prove the material's utter lack of social importance. After §311(a)(2) became law, this vested defense was no longer the same. The prosecution, rather than being required to show, *from the material itself,* an utter lack of value, could now substitute the defendant's behavior as evidence of lack of value. Thus,

§311(a)(2) permitted convictions on less and different evidence than had been previously required.

When §311(a)(2) became law, dealers in sexual material lost their right to sell, disseminate or publicize such material any way they pleased. That right became severely limited. Important changes were brought about by 311(a)(2); and therefore its application, retroactively, to petitioner violated the proscription against *ex post facto* laws.

Critically, the retroactive application of §311(a)(2) to petitioner also deprived him of due process. In light of the California Supreme Court's holding in *Noroff,* and the absence of a "pandering" statute, defendant had no notice that he was under a duty to conform his behavior to some standard. *He simply did not know that his behavior could affect the question of the obscenity of the material.* As notice of proscribed behavior is a fundamental right, especially where free speech matters are involved, *Miller v. California, supra,* the application of §311(a)(2) to petitioner without prior notice to him constitutes a denial of due process. *Bouie v. Columbia,* 378 U.S. 347 (1964).

Certiorari should be granted to correct this serious constitutional error.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,
ARTHUR WELLS, JR.,
WELLS & CHESNEY, INC.,
Attorneys for Petitioner.

RICHARD L. CHESNEY,
Of Counsel.

July 12, 1976.

(Appendices Follow)

APPENDICES

Appendix A

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

1 Crim. 10255
(Sup. Ct. No. C 123)

People of the State of California,
Plaintiff and Respondent,
vs.
Roy Splawn,
Defendant and Appellant.

[Filed Mar. 29, 1976]

OPINION

This is a pornography case here on remand from the United States Supreme Court. Judgment of this court was entered on January 11, 1973, affirming appellant's conviction of violation of Penal Code section 311.2 (distribution of obscene material). Appellant's petition for writ of certiorari was granted. On January 7, 1974, judgment of this court was vacated and the cause remanded for consideration of this court in light of *Miller v. California,* 413 U.S. 15;

Paris Adult Theatre I v. Slaton, 413 U.S. 49; *Kaplan v. California,* 413 U.S. 115; *United States v. 12 200-ft. Reels of Super 8mm. Film,* 413 U.S. 123; *United States v. Orito,* 413 U.S. 139; *Heller v. New York,* 413 U.S. 483; *Roaden v. Kentucky,* 413 U.S. 496; and *Alexander v. Virginia,* 413 U.S. 836.

In *Miller,* the court arrived at standards for testing the constitutionality of state legislation regulating obscenity and it is against these standards that we are directed to consider the conviction of appellant. Although *Miller* involved the same statute of which appellant stands convicted (Pen. Code, § 311.2), the court remanded Miller's case considering that an existing state statute, while not couched in terms of the new requirements, might have been previously construed in such a way as to meet new specificity requirements.

This court ordered the recall of its remittitur on February 14, 1974, and on August 1, 1974, the parties having so stipulated, the submission of the cause was vacated to await the resolution of the constitutionality of the California statute, a question then again pending in the federal courts. The question has now been decided by the California Supreme Court in *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, in which it was held that Penal Code section 311 satisfied the requirement of specificity articulated in *Miller.* The Supreme Court ruled that section 311 "has been and is to be limited to patently offensive representations or descriptions of the specific 'hard core' sexual conduct given as examples in ***Miller I,***

i.e., 'ultimate sexual acts, normal or perverted, actual or simulated,' and 'masturbation, excretory functions, and lewd exhibitions of the genitals.' (413 U.S. at p. 25.) As so construed, the statute is not unconstitutionally vague." (16 Cal.3d at p. 81.)

We turn now to other issues raised by appellant Splawn in the appeal from the judgment convicting him of violation of section 311.2 of the Penal Code and since our previous opinion has been vacated, now affirm the judgment of the lower court for the reasons explained below:

Appellant was charged with selling to one Drivon two reels of movie film depicting sexual activity between two persons and three persons, including sexual intercourse, oral copulation and sodomy. Appellant at that time claimed that Penal Code section 311.2 is unconstitutional in that it violates the equal protection clause by exempting projectionists from its provisions while leaving clerks of bookstores subject to prosecution. Appellant, however, was not a clerk in a bookstore but rather its owner. The rule permitting a person to attack a statute only on constitutional grounds applicable to himself precludes appellant from raising this point. "The rule is well established . . . that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situatioin which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations. (Citations.) Petitioner has not

shown that the statute is being invoked against him in the aspects or under the circumstances which he suggests, and hence may not be heard to complain." (*In re Cregler,* 56 Cal.2d 308, 313; *People v. Maugh,* 1 Cal.App.3d 856, 862; compare *In re Davis,* 242 Cal. App.2d 645, 666.)

Appellant also attacks the constitutionality of this section on the additional ground that it goes beyond the area of legitimate state control. His position is that a state can only make criminal the dissemination of obscene material to juveniles, unwilling adults, or the "pandering" of such materials to prurient interest. This position was rejected by the California Supreme Court in *People v. Luros,* 4 Cal.3d 84. Here, as in *Luros,* evidence discloses commercial distribution of obscene material. The films in the present case were sold for $70.00.

In addition to his attack on the constitutionality of section 311.2, appellant contends that the jury was improperly selected, that the jury was improperly instructed, and that the evidence is insufficient to support the conviction. None of these contentions may be sustained.

Appellant contends that the jury was improperly selected in that prospective jurors were excluded from the venire because they had not been residents of the county for one year. Appellant argues that the residency requirement incorporated in Code of Civil Procedure section 198 deprives him of his constitutional right to trail by a jury selected from a cross-section of the entire community.

It is clear that certain groups united by common interests or characteristics may not be excluded from jury service. The United States Supreme Court has listed six bases on which groups may not be excluded —economic, social, religious, racial, political and geographical. (*Thiel v. Southern Pacific Co.,* 328 U.S. 217, 220.) It has recently been argued that exclusion in Code of Civil Procedure section 198 of persons under 21 was impermissible but this argument was rejected in *People v. Hoiland,* 22 Cal.App.3d 530, wherein the court pointed out that it was "'highly speculative whether the decisional outlook of such excluded persons would be different than that of persons a mere few years older.'" (*People v. Hoiland, supra,* at 536, quoting *King v. United States,* 346 F.2d 123, 124.) Such an observation is clearly pertinent with regard to the residence requirement. Persons residing in a county under one year come from either sex and from all racial, religious, political and economic groups. They comprise no cohesive group and their exclusion does not deprive a defendant of his right to be tried by a cross-section of the community.

Appellant also argues that the residence requirement arbitarily deprives a section of the community of their right to be considered for public service. He relies on recent cases wherein certain residency requirements for voting and pursuing elective office have been held to serve no legitimate state interest. (See *Keane v. Mihaly,* 11 Cal.App.3d 1037, one-year requirement for voting; *Camara v. Mellon,* 4 Cal.3d

714, three-year requirement to run for city council; *Zeilenga v. Nelson,* 4 Cal.3d 716, five-year requirement to run for board of supervisors.) These cases have reached the courts by way of petitions brought by persons denied the right to vote or run for office. Assuming *arguendo* that the residency requirement for service on a petit jury is subject to the same principles, the requirement should be challenged by those denied the right to serve. The defendant in a criminal case is not prejudiced by the denial of the right to serve on a jury by virtue of the residency requirement. His right is to be judged by a cross-section of the community and this right is not prejudiced by the residency requirement. Any error in this regard would not require reversal of this case.

Appellant argues that the jury was misinstructed as to the definition of the word "knowingly" as used in Penal Code section 311(e) and Penal Code section 311.2. The sale of the films occurred on November 7, 1969, and it is the law on that date which applies here.

Between 1961 and 1969, Penal Code section 311(e) provided that "knowingly" meant having knowledge that the matter was obscene. Prior to 1961, the prosecution had to eestablish that the defendant knew the content of the material but it was not necessary to show that he also knew it was obscene. (*People v. Harris,* 192 Cal.App.2d Supp. 887, 892, reversed on other grounds; *In re Harris,* 56 Cal.2d 879; *People v. Williamson,* 207 Cal.App.2d 839, 846, disapproved on other grounds, *In re Giannini,* 69 Cal.2d 563, 577.) In 1961 this section was amended to provide that the

defendant had to have knowledge that the matter was obscene. This was not interpreted to mean knowledge that a court would decide the matter was obscene. A reasonable construction was held to be that "[t]he defendant must have known the contents of the material, and must have been in some manner aware of its obscene character." (People v. Campise, 242 Cal.App.2d Supp. 905, 915.) Penal Code section 311(e) was amended, effective November 10, 1969, to provide that "'[k]nowingly' means being aware of the character of the matter . . . ."

The instructions as to knowledge given in the case at hand are as follows: "The word 'knowingly' as used in the context of Penal Code Section 311.2, means that each of the defendants must have known the contents of the material, and must have been in some manner aware of its obscene character. It is not necessary to construe 'knowledge that the matter is obscene' as meaning that each of the defendants knew that a Court would decide the matter to be legally obscene, . . .

"Nor is direct evidence that each of the defendants has personally viewed the films in question necessary, for knowledge may be established by circumstantial evidence."

The jury was instructed properly either under the statute as it stood prior to 1969 (*People v. Campise, supra; People v. Pinkus,* 256 Cal.App.2d Supp. 941, 949-950) or under its later amendment. There was no necessity, as appellant contends, to repeat the definition of obscenity and require the jury to find ap-

pellant had knowledge of the presence of all elements of such a definition.

Appellant also complains of the following instructions: "In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the mature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, such evidence is entitled in [sic] a matter for you, the Jury, to determine.

* * *

"Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter [is] utterly without redeeming social importance."

These instructions conform to the language of Penal Code section 311(a)(2) which was added to the statute in the 1969 amendment. In 1966 the Supreme Court in *Ginzburg v. United States,* 383 U.S. 463 recognized the probative value of evidence a defendant was exploiting, for commercial purposes, material openly advertised to appeal to the erotic interest

of his customers, an activity referred to as "pandering." In 1967 the California Supreme Court in *People v. Noroff,* 67 Cal.2d 791, 793, pointed out that the Legislature had not created the crime of pandering. The court did not, however, disapprove of any use of evidence of pandering for its probative value on the issue of whether the material was obscene. It merely rejected the concept of pandering of nonobscene material as a separate crime under the existing laws of California.

The 1969 amendment did not make pandering of nonobscene material a separate crime. Rather it clarified the use to which evidence of pandering might be made in the determination of whether one of the requirements of obscenity existed, *i.e.,* lack of any redeeming social value. It did not aggravate the punishment for the offense, create a crime which did not previously exist, or deny the accused a vested defense. The application of the amendment to the appellant's trial does not contravene the constitutional doctrine prohibiting ex post facto laws. (See *People v. Bradford,* 70 Cal.2d 333, 343-344, fn. 5; *People v. Snipe,* 25 Cal.App.3d 742, 747-748.)

Appellant also contends that there is no substantial evidence to support a finding that the films in question went beyond the "customary limits of candor" or that the predominant appeal of the films was to the "prurient interest" of the average person, as required by section 311 et seq. of the Penal Code.

" 'Obscene matter' means matter, taken as whole, the predominant appeal of which to the average per-

son, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." (Pen. Code, § 311(a); see *Roth v. United States,* 354 U.S. 476, 488-489.)

The test of community standards applies to the questions of whether the predominant appeal of the material is to "prurient interest" and also to the question of whether the material exceeds the "customary limits of candor." (*In re Giannini, supra,* 69 Cal.2d 563, 572-574.) A statewide rather than a national standard is applicable to judge community standards where the subject matter is "obviously not intended for nationwide dissemination." (*In re Giannini, supra,* at 579.) The prosecution, in order to bear its burden of proof, must introduce evidence of community standards through expert testimony, since the judge or jury, which makes the initial factual determination, and later the appellate court, which must reach an independent decision as to the obscenity of the material (*Zeitlin v. Arnebergh,* 59 Cal.2d 901, 908-909), do not compose a cross-section of the community. (*In re Giannini, supra,* at 574-576.)

To establish that these films exceeded the contemporary community standards of candor in California, the People presented Officer Barber of the Los Angeles Police Department. The trial court ruled that he

was "qualified to give his opinion in the area of obscenity, the general area of obscenity." He had viewed the films in question as well as other films brought to the attention of his department during the period in question. He testified that the depiction on film of close-ups of sexual intercourse, oral copulation, sodomy and masturbation were beyond the customary limits of candor in the State of California. There was no evidence to the contrary. A viewing of the films indicates they do depict these activities.

Appellant objects to the testimony of Officer Barber as an expert witness but it is clear that this officer's interviews and studies of interviews for a state survey, the questioning of laymen, and participation in civic panels were directed toward ascertaining the standards of the community in the area of obscenity. We have concluded that the court did not err in admitting this testimony and in instructing the jury regarding the weight to be given it.

The other expert witness for the prosecution was Dr. Peschau who testified that he had experience in evaluating the psychologically healthy, as well as the mentally ill and sexually disturbed. He testified that, in his opinion, the predominant appeal of the films was to a prurient interest. Appellant's objections to his qualifications and opinion go to the weight of his testimony.

The fact that Dr. Peschau and Officer Barber expressed their opinions in terms of ultimate facts does not render their testimony inadmissible. (Evid. Code, § 805; *People v. Cole,* 47 Cal.2d 99, 105.) The jurors

were instructed that they were not bound by the testimony of the experts but should give it the weight to which they found it to be entitled and disregard it if they found it to be unreasonable.

We have viewed the movie films and have concluded that the jury did not err in its finding of obscenity.

The judgment is affirmed.

Brown (H. C.), J.

We concur:

Draper, P. J.

Caldecott, J.*

*Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

Appendix B

CLERK'S OFFICE, SUPREME COURT

4250 State Building
San Francisco, California 94102
May 26, 1976

Dear Sir: I have this day filed Order

HEARING DENIED

In re: 1 Crim. No. 10255
People

vs.

Splawn

Respectfully,
G. E. Bishel,
Clerk.